Supreme Court, U.S.
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No. 05-1397

IN THE

Supreme Court of the United States

RUBEN CARNERO,

Petitioner,

v.

BOSTON SCIENTIFIC CORPORATION,

Respondent.

On Petition For A Writ of Certiorari to the
United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that the whistleblower provision of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A(a), does not protect a foreign employee complaining of misconduct by his overseas employer which is a subsidiary of a U.S. company but is not itself a "company" within the meaning of the statute.

RULE 29(6) CORPORATE DISCLOSURE STATEMENT

Boston Scientific Corporation has no parent corporation and no publicly-held company holds 10% or more of its stock.

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STATEMENT OF THE CASE

Petitioner was employed by an Argentinean subsidiary of respondent Boston Scientific Corporation ("BSC") under an employment agreement governed by Argentinean law. Pet. App. 2a, 8a. When he was terminated from that employment he filed a claim against BSC with the Department of Labor ("DOL") under the whistleblower provision of the Sarbanes-Oxley Act ("SOX"). 18 U.S.C. § 1514A(a), added by SOX § 806. Pet. App. 4a. Petitioner alleged that he was fired in retaliation for alerting his superiors to financial irregularities in the operations of BSC's Latin America subsidiaries. *Id.* at 1a.

The DOL issued a preliminary ruling that it had no jurisdiction over petitioner's claim because § 1514A(a) does not apply to foreign nationals working overseas. *Id.* at 4a. Petitioner then sought de novo review of his claim in the District Court for the District of Massachusetts. The District Court dismissed the claim, agreeing with the DOL that § 1514A(a) does not apply extraterritorily. *Id.* at 5a, 40a-44a.

The First Circuit affirmed. It adhered to this Court's teaching in *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991) ("*Aramco*") that a court must assume that Congress legislates with an awareness of a presumption against extraterritorial application, and that the presumption may be overcome only by an "'affirmative intention of the Congress clearly expressed.'" Pet. App. 11a, quoting *Aramco*, 499 U.S. at 248. The court then carefully examined the statute's "text, context, structure, and legislative history," Pet. App. 11a, concluding that Congress "made no reference to application abroad and tailored the relevant statute to purely domestic application." *Id.* at 30a. Accordingly, the court held that § 1514A(a) "does not reflect the necessary clear expression of congressional intent to extend its reach beyond our nation's borders." *Id.*

REASONS FOR DENYING THE WRIT

1. Whether the SOX whistleblower provision applies to a foreign employee of a U.S. corporation's overseas subsidiary that is not a "company" under the statute presented a case of first impression in both the district court and the court of appeals. Pet. App. 6a. No other federal court to our knowledge has yet addressed the issue. Hence no intercircuit conflict requiring the Court's resolution exists.

2. The decision below does not conflict with any SOX regulations issued by the Securities and Exchange Commission.

Congress charged the SEC with administering the SOX provisions that may fairly be characterized as securities laws and that therefore fall within the purview of the SEC's regulatory expertise. Congress obviously considered SOX's whistleblower provision, however, to be an employment law, for it delegated its administration to the DOL. Thus there is no conflict between the SEC's determination that the provisions it enforces apply extraterritorily and the ruling below – with which the DOL agrees[1] – that the whistleblower provision does not.

Plaintiff is incorrect in contending that the SEC and the First Circuit have construed identical statutory language differently. The SEC has by rule determined that three provisions of the statute that refer to securities "issuers" apply to foreign as well as domestic issuers. *See* Pet. 6.[2]

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[1] Pet. App. 29a-30a.

[2] SOX § 306, 15 U.S.C. § 7244, prohibits certain insider trading by officers and directors of an issuer; § 406, 15 U.S.C. § 7264, requires issuers to disclose whether they have adopted a code of ethics for senior financial officers; and § 407, 15 U.S.C. § 7265, requires issuers to disclose whether a financial expert sits on their audit committee.

Section § 1514A(a), the whistleblower provision, speaks of a "company" rather than an "issuer." Petitioner notes that the description of a "company" in § 1514A(a) is similar to the statutory definition of "issuer." Pet. App. 5-6 n.1.[3] But the First Circuit has not ruled that the term "company" in § 1514A(a) means something different from the term "issuer" in the provisions addressed by the SEC. Indeed, the question whether the term "company" might include a foreign company does not arise in this case, where the only entity that fits the description of "company" is the respondent, a domestic company. Nor has the First Circuit in any respect impugned the validity of the SEC "issuer" regulations, which the court never mentioned.

3. Review here is also not warranted because the decision below is correct. The First Circuit carefully considered petitioner's arguments but found them outweighed by the textural silence on the extraterritoriality issue, the statute's legislative history, and a host of positive indicia "that Congress thought the statute was limited to the territorial jurisdiction of the United States." Pet. App. 11a. Thus, the court noted–

- that SOX § 106, 15 U.S.C. § 7216, specifically addresses the extraterritorial application of the statute to foreign accounting firms (Pet. App. 15a);

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[3] "Issuer" means "an issuer (as defined in section 3 of the Securities Exchange Act of 1934 * * *) the securities of which are registered under * * * that Act * * * or that is required to file reports under [that Act], or that files or has filed a registration statement that has not yet become effective under the Securities Act of 1933 * * *." SOX § 2(a)(7), 15 U.S.C. § 7201(7). Section 1514A(a) provides that "[n]o company with * * * securities registered under * * * the Securities Exchange Act * * * or that is required to file reports under" that Act, shall retaliate against a whistleblower employee. 15 U.S.C. § 1514A(a).

- that Congress elsewhere in SOX provided expressly for extraterritorial enforcement of a different, criminal, whistleblower provision, 18 U.S.C. § 1513(e), added by SOX § 1107 (Pet. App. 16a); and

- that the legislative history of other statutory provisions "show[s] Congress's keen awareness of the application of some of the [statute's] provisions to entities in other countries and of the associated problems" (Pet. App. 25a).

The court also noted that Congress provided no mechanisms "for resolving potential conflicts with foreign labor laws and procedures" or "for enforcing the whistleblower protections in a foreign setting." Pet. App. 26a. "[T]here is no discussion about the increased administrative and logistical burdens that would fall on the DOL to administer" a statute protecting "countless employees in countless areas around the world." *Id.* at 27a.

Finally, the First Circuit observed that § 1514A's venue provisions contemplate domestic claims only (*id.* at 28a), and that in three decisions the DOL has ruled that § 1514A(a) has no extraterritorial reach. *Id.*

For all these reasons, the court below correctly held that § 1514A(a) "does not reflect the necessary clear expression of congressional intent to extend its reach beyond our nation's borders." *Id.* 30a. Hence further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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